In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES

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1. In seeking to sustain the Mississippi tax imposed upon federal military purchasing facilities as a result of their purchase of alcoholic beverages from out-of-state distillers, appellees (Br. 5-6) place principal reliance upon *Collins* v. *Yosemite Park Co.*, 304 U.S. 518. There, the Court held that a concessionaire which operated hotels, camps, and stores in Yosemite National Park, under a contract with the Secretary of the Interior, was subject to a California ex-

cise tax on the sale of beer, wine, and distilled spirits. Appellees state (Br. 6) that "[u]nless the Court is now prepared to overrule this aspect of the Yosemite decision, the decision below must be affirmed."

Collins v. *Yosemite Park Co.* does not mandate approval of the Mississippi levy at issue here. Unlike the military purchasing facilities involved in this case, the concessionaire operating in Yosemite National Park was not a federal instrumentality. There, the concessionaire was not incorporated into the government structure nor was it operated as an arm of the government for the performance of essential governmental functions. Cf. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485; *United States* v. *Township of Muskegon*, 355 U.S. 484, 486; *United States* v. *Boyd*, 378 U.S. 39, 48; *Department of Employment* v. *United States*, 385 U.S. 355, 358-360. To the contrary, it was a private California corporation which conducted its business in Yosemite National Park pursuant to a contract with the Secretary of the Interior (see 304 U.S. at 521).[1] Such a con-

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[1] Contrary to appellees' argument (Br. 11), the Court in *Collins* did not decide that the private concessionaire was a federal instrumentality. The district court in that case concluded that it was immaterial whether the concessionaire was a federal instrumentality (see 20 F. Supp. 1009, 1014 N.D. Cal.)) and that point was never raised by any of the parties before this Court. Indeed, the Court's description of *Collins* in its first opinion in this case (412 U.S. 363, 375) as turning upon the reservation of the state's taxing power is confirmed by the briefs filed in that case which focused entirely upon the scope of the reservation of state taxing power incident to the cession of the park. See *Rainier*

tractor has none of the attributes of a governmental instrumentality and would not have been shielded from the imposition of a state sales tax by the doctrine of immunity applicable to federal instrumentalities.[2]

At all events, assuming *arguendo* that the concessionaire in *Collins* was considered to be a federal instrumentality, the reservation of the state taxing power in Yosemite National Park distinguishes it from this case. There, the applicable reservation of state taxing power was broadly cast to include "the right to tax persons and corporations, their franchises and property on the lands included in said parks * * *." See 16 U.S.C. 57, as quoted in *Collins, supra*, 304 U.S. at 526, n. 10. See also *Rainier Nat. Park Co.* v. *Martin*, 18 F. Supp. 481 W.D. Wash.),

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Nat. Park Co. v. *Martin*, 18 F. Supp. 471, 486 (W.D. Wash.), affirmed *per curiam*, 302 U.S. 661, where the district court assumed without deciding that a similar concessionaire was a federal instrumentality. But compare *Rainier Nat. Park Co.* v. *Henneford*, 182 Wash. 159, 162-163, 45 P. 2d 617, 618 (Sup. Ct.), certiorari denied, 296 U.S. 647, which held that such concessionaires were not federal instrumentalities. See also S.S.T. 31, XV-2 Cum. Bull. 400, which holds that service performed in the employ of operators of concessions of national parks does not constitute service performed in the employ of an instrumentality of the United States within the meaning of the Social Security Act.

[2] *Howard* v. *Commissioners*, 344 U.S. 624, cited by appellees (Br. 7), has no application to the question presented. That case involved state taxation of the income of employees of a federal ordinance plant located within a federal enclave. These employees were not federal instrumentalities and, pursuant to the consent of the Buck Act, the fact that the tax was levied within a federal enclave was no bar to its imposition.

affirmed *per curiam*, 302 U.S. 661. While that general reservation of state taxing power in Yosemite National Park might have arguably included federal instrumentalities, it cannot be analogized to the narrowly drawn congressional consent in the Buck Act which is applicable here.

Although the Buck Act provides that no person shall be relieved of the payment of any state sales tax "on the ground that the sale * * * occurred in whole or in part within a Federal area" (4 U.S.C. 105(a)), it further provides that the consent "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof" (4 U.S.C. 107(a)). In the face of this presently applicable statutory exception designed to protect federal instrumentalities, the scope of the Buck Act is not equivalent to the prior reservation of state taxing power involved in *Collins*.[3] As the Court expressly noted in its prior decision in this case, "this aspect of the [*Collins*] decision was bottomed specifically on the State's reservation of taxing

[3] Appellees erroneously state (Br. 7) that "[i]f * * * a state tax is laid on a federal instrumentality, the Buck Act exemption applies alike to exclusive and concurrent jurisdiction enclaves." The Buck Act merely permits the state to levy certain taxes within federal areas just as if they were within the state jurisdiction. But the exception in 4 U.S.C. 107(a) for federal instrumentalities flatly contradicts appellees' assertion that the Buck Act provides a generalized congressional consent to state taxation of federal instrumentalities. A plain reading of the Buck Act requires precisely the opposite conclusion.

authority in its cession of lands to the United States" (412 U.S. at 375).

Hence, the critical question in this case, which was not considered in *Collins*, is whether the legal incidence of the state tax falls upon the military purchasing facilities which the district court correctly found to be federal instrumentalities (J.S. App. 9a). If, as we have argued at pp. 17-23 of our opening brief, the legal incidence of the Mississippi tax is on the military purchasing facilities, it cannot be imposed unless Congress has given its consent. As the Court stated in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122, "[t]he doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate."

2. Contrary to appellees' further argument (Br. 20), *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, controls this case despite the fact that the Court did not reach the constitutional question whether national banks were immune from state taxation as federal instrumentalities. The significance of that decision for purposes of this case is not the particularized tax immunity it accords national banks. Rather, it is the Court's conclusion there (392 U.S. at 346-348) that the legal incidence of the Massachusetts sales tax was upon the national bank because the state statute required that the tax be passed on to the purchasers. The provisions in Mississippi's Regulation 25 requiring that direct orders

from military purchasing facilities to out-of-state distillers "shall bear the usual wholesale markup" and that the distiller shall "remit the wholesale markup" to the State are in all pertinent respects equivalent to the Massachusetts tax. Thus, the determination of the Mississippi legislature and its taxing authorities that the tax be passed on to the military requires the conclusion that the legal incidence of the tax is upon the federal instrumentalities.[4] In light of the constitutional prohibition against such a state levy, the Mississippi tax cannot stand.

Respectfully submitted.

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APRIL 1975.

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[4] *Polar Co.* v. *Andrews*, 375 U.S. 361, relied upon by appellees (Br. 7-8), is distinguishable. There, the Court found that the legal incidence of the Florida tax was upon the seller's activity of processing or bottling milk. Unlike this case, the statute did not require that the tax be passed on to the federal purchaser (see 375 U.S. at 382-383).

Appellees' reliance (Br. 11) upon *National Distillers* v. *State Board*, 83 Cal. App. 2d 35, 187 P.2d 821 (D. Ct. App.), is similarly misplaced. In that case, the court upheld a tax upon the sale of alcoholic beverages to the United States on the ground that the legal incidence of the tax was on the seller. Moreover, passage of title to the goods in that case took place within the jurisdictional limits of California.

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